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CHARLES ELMORE GROPLEY

Supreme Court of the United States

October Term, 1946
No. 119

FRANK W. FORD, as Trustee in Bankrutcy of HARLEM GARMENT CENTER, INC., Bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1946

No. 1469

FRANK W. FORD, as Trustee in Bankruptcy of HARLEM GARMENT CENTER, INC., Bankrupt,

Petitioner,

against

GRAHAM MAGEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Absent from the Petition a consistent marshalling of the facts sufficient to frame the issue involved, Respondent presents below a summary factual statement.

The Undisputed and Uncontradicted Facts

(1) Graham Magee, the respondent, was the nominal Treasurer (and only nominally the Treasurer) of the bankrupt corporation (R. 52, 53, 65, 124): he had invested $6,250 in the corporation (R. 79) on the recommendation of his friend Joseph Casey (of Washington) who brought him in (R. 123) as the result of a request made by one William E. Leahy (also of Washington) who (R. 126) had been for many years a friend of one

(2) Silverman (Joseph) who, although he held no office in the bankrupt corporation, was its virtual owner (R. 107, 109), conducted its operations in all its various phases, was its day-by-day manager (R. 107, 108, 110, 112) and had the job of raising money for payroll as one of his duties (R. 111), had invested more than $50,000 in the corporation (R. 83, 109), but did not hold office in the corporation because he did not want his name officially connected with the corporation by reason of previous tax difficulties (R. 107, 108, 123).

(3) Magee had been associated with the bankrupt corporation hardly three weeks (he made his investment in July 1945—R. 26) when Silverman requested him (during the latter part of July or the early part of August, 1945) to advance money for payroll (Magee's testimony R. 60, 69, 78,—Golenbock's testimony R. 99, 102, 106): Magee refused to make the advance and called Joseph Casey (who had been the means of bringing him into the corporation) in Washington on the telephone, because Silverman kept pressing him, with the result that Casey promised to contact Leahy (who, through Casey, had got Magee into the corporation) to get Leahy's promise of reimbursement if Magee made the advance (R. 29, 30, 60, 69): Magee reported to Silverman his talks with Casey and Silverman told him he could credit the Leahy check against his payroll loan (R. 72). In the meantime, Silverman had also been talking with Casey (Golenbock's testimony—R. 105), and Leahy's name had figured in these conversations (R. 101).

(5) Casey brought pressure to bear on Leahy to repay Magee for any advance he might make, urging that he was morally bound to see Magee whole because it had been

through him that Magee became associated with the corporation and Leahy agreed (R. 126, 127).

(6) Magee on August 3, 1945, gave his check to the bankrupt corporation for $5128.42 as a payroll advance (R. 43, 50).

(7) Magee received Leahy's check, dated August 8, 1945, for $5,000 and deposited it in his own bank account; it was not necessary for him to endorse the corporation's name, because it was not made out to the corporation (R. 14).

(8) Less than three weeks after receiving the Leahy check Magee, on August 27, 1945, made a new advance of $5,000 to the bankrupt corporation (R. 70) evidenced by Respondent's Exhibit 2 (R. 169).

(9) Golenbock, the President of the bankrupt, testified he knew about the Magee advance on August 3, 1945, had talked with Silverman about an arrangement for reimbursement to Magee—but the Referee refused to allow him to testify to the details of his talks with Silverman regarding the Magee payroll advance and its connection with the Leahy check (R. 99, 103) and as to whether Silverman had spoken to him about a check coming in from Leahy (R. 112).

(10) Virtually, at the commencement of the proceeding, before direct examination of Magee had been finished, before cross-examination, before other witnesses were examined,—the Referee prejudged what he considered to be the important issue in the proceeding,—whether Magee knew Leahy was obligated to pay $500 a share for 10 shares of the bankrupt corporation (R. 49).

The Factual Issue Involved

The Trustee produced no witnesses of his own to make out his case. He relied on such facts as he could force from Magee, making Magee his own witness. He did not produce Silverman to contradict Magee's recital of the facts, or Golenbock's testimony. As rebuttal, he put in evidence the deposition (taken in Washington) of Leahy, as to how Leahy came to send Magee his check for $5,000. Leahy's testimony consisted of "hazy" recollections (R. 142, fol. 424; R. 145, fol. 434; R. 147, fol. 441; R. 148, fol. 442; R. 148, fol. 443; R. 149, fol. 445; R. 150, fol. 449; R. 151, fol. 453; R. 154, fol. 462; R. 156, fol. 468; R. 158, fol. 473).

In order to prove that the Magee claim (that when he advanced $5,128.42 on August 3, 1945, it was arranged he was to be reimbursed by the Leahy check)—was not substantial but merely colorable, the Trustee relied heavily upon the purported contradictory statement made by Magee when he testified during a 21A proceeding that he thought Leahy had paid for stock in the bankrupt corporation in August, 1945, by a check for $5,000—a self-contradiction that did not go to the heart of the Magee claim, for Magee's claim could still be true, and still Leahy might have expected that the corporation would give him stock,—the triangular talks between Magee and Casey, and between Casey and Silverman, and between Magee and Silverman, working out a triangular arrangement, by which Magee would advance payroll, be reimbursed by Leahy, who would be compensated by the corporation by way of stock.

Magee, in explanation of his testimony given at the 21A proceeding, testified (R. 75):

> "* * * when I testified the first time Mr Speciner (the Trustee's attorney) knew quite well that I was not and did not have all of the facts with respect to the moneys that were paid into the corporation or the money I had advanced. As a matter of fact I had not expected to be questioned about the money I advanced. He knew it; he had a bookkeeper here and I had to ask her questions about the moneys which were advanced; he knew I did not recall the facts."

The confusion into which Magee had been thrown when he testified at the 21A proceeding, without warning or being prepared on the facts, is illustrated by a recital of the following statements made by him at that hearing, all of them errors that could not possibly have gained him or anyone else any advantage, if made with a conscious view to lying:

(a) he testified that at a meeting of the directors on July 17, 1945, the resolution of May 24, 1945, had been passed, yet it was perfectly clear this did not happen (R. 23)

(b) he did not know who the directors were—he could only imagine who they were (R. 31)

(c) He stated that the fixed value of a share was $50, although it was really $500 (R. 33), having paid $5,000 for 100 shares himself, he should have known it was $500, not $50,—had he been alert, not confused

(d) he said he deposited the Leahy check in the Amalgamated Bank (the corporation depository) although he had deposited it in his own bank (and it is

obvious he could not possibly gain anything by lying —besides which it was a matter of easy verification) —(R. 38).

(e) he stated he did not remember "when I put up my own money" (showing his mind was hazy at the time)—(R. 38).

Magee, within a day or two, called the Trustee's attorney on the telephone, to say he checked the facts of the Leahy check, and gave him the details (R. 66, 67). The Trustee's attorney, testifying, corroborated this statement (R. 133 et seq.).

Questions Raised By Petitioner

The Petitioner asserts he has four questions to present to this Court for answer:

1. **If a Referee in a turnover proceeding makes a finding "that respondent's story is unbelievable and a concoction"—where there is "abundant support in the record"—is it not established that the adverse claim is without merit?**

The question is not pertinent and ignores the fundamental inquiry in a proceeding of this kind—which is, has a claimant presented an arguable hypothesis as question of fact or of law? If the record shows he has, he makes out a claim that is more than colorable,—and the Circuit Court of Appeals here has decided that Magee's claim is more than colorable.

2. May the Circuit Court of Appeals ignore Rule 52(a) F. R. C. P. and disregard the findings of fact of the Referee?

Where a record discloses an arguable claim, as matter of fact or of law, it does not become a question of whether the Referee believes or does not believe a witness or witnesses—which is a function that only ultimate triers of the facts may assume—while the Referee in bankruptcy, in a proceeding of this kind, is clearly not the ultimate trier of the facts. The question of whether this rule applies was never raised in the Circuit Court, was not passed upon by the Circuit Court in this case, nor was it passed upon by any of the other circuits in any of the cases cited in the Petition.

3. Must a Referee accept as true respondent's "utterly unbelievable story" because one of four contradictory versions, if believed, would make him an adverse claimant?

This is an admission that the claimant has an arguable adverse claim. Not four, but only one version was given by Magee. What the Petitioner has elaborated as varying versions are nothing more than incidental additions or qualifying variants to the main story,—a situation which inheres in any case where a witness is cross-examined at length, and asked to go over his story again and again. If apparent discrepancies appear,—they are "mere jury arguments," as was held by the Circuit Court of Appeals for the 8th Circuit in the *Kansas City Journal-Post* case (see Point II, *Post*).

4. Is the Second Circuit Court of Appeals right—or are the Third, Seventh and Eighth Circuit Courts of Appeals right?

This assumes, without the slightest support, there is divergence in matter of law between the different circuits mentioned. There is no divergence of any kind, and none has been pointed out in Petitioner's brief (See Point II, *Post*).

The Real Points

There are only two questions presented by the Petitioner's Brief—the rest are garnishments,—repetitions intended to give fictitious emphasis to specious argument:

1. Does the record show that Magee's claim is more than colorable?
2. Is there divergence of opinion on a matter of law between the Second Circuit Court of Appeals in the instant case, and on the same matter of law in one of the other cases decided by another Circuit Court?

The Court's warning to Trustees to avoid bringing turnover proceedings where there is no basis for same—is not an issue in this case, and is patently not ground for review here.

POINT I

Respondent showed he had a good adverse claim.

On the proceeding, both the Trustee's attorney and the Referee (who blindly followed the lead of the Trustee) assumed that the most important question in the case was whether Magee lied when he asserted that when Leahy sent him the check, Leahy did not expect to receive stock: this obviously was not the crucial point,—for the true query was—was there more than mere color to the claim of Magee that he would not make the payroll advance unless and until he received the promise to have the Leahy check by way of reimbursement for the loan?—on which claim he was corroborated by Golenbock, the President, and by Casey. This claim by Magee was clearly not incredible on its face—and the Referee had no right to assume the role of ultimate trier of the facts—particularly where the Trustee failed to produce Silverman to contradict Magee.

When Magee received such a promise,—it clearly made no difference whether Leahy expected to receive stock, or anything else, or nothing at all.

POINT II

There is no conflict of decision between this case and any other case in any other circuit.

Petitioner asserts, without support in the petition or the brief, that there is serious conflict between the instant decision and decisions in the Third, Seventh and Eighth Circuits.

> *Rabinovitz* v. *Oughton*, 92 F. (2d) 297—C. C. A. 3 (Petitioner's Brief, Page 12).

There is nothing in the Circuit Court opinion which makes a ruling of law in conflict with any ruling in the opinion of the Circuit Court in the instant case. That being so, there cannot be divergence of opinion. In that case, Rabinovitz, owner of the business, withdrew from the bank account $10,000 within a few days of the bankruptcy, leaving $50 in the bank, and despoiled the company further of large quantities of merchandise, at a time when the books shows the company owed him very little. It was a clear case of despoliation on the verge of bankruptcy with no redeeming features. The Circuit Court affirmed the Referee,—so there was no point of law asserted or rejected,—and consequently no possible divergence of opinion.

> *Re*: *Kansas City Journal-Post*, 144 F. (2) 819—C. C. A. 8 (Petitioner's Brief, Page 13).

In this case, the Circuit Court held that Newman's claim that he had a right to withdraw company funds because of the failure of a creditor to assign over its claim against the

company, was without foundation as matter of law—and it was clear from the record, that all Newman had was an argument that was insufficient as matter of law. It would have been futile to relegate the matter to a plenary suit, for the facts of the case were undisputed, and on those facts, no legal right existed in Newman to withdraw company funds. But the Circuit Court enunciated no principle of law in conflict with the opinion of the Circuit Court in the instant case.

On the other hand, this same court, in the same proceeding, involving a turnover order secured against Newman's partner in the transaction, one Schapiro,—

> *Re*: *Kansas City Journal-Post Co.* (*Bostian* v. *Schapiro*), 144 F. (2d) 812.

the Referee had termed the claim of Schapiro spurious, and had criticized his testimony and that of his attorney as "fictitious" and "beyond belief"—the Circuit Court of Appeals saying of such characterizations that they were "mere jury arguments," and holding that the Referee had no right to ignore the corroborative testimony of Schapiro's attorney.

> *Re*: *Dayton Hotel Co.*, 110 F. (2d) 459—C. C. A. 7 (Petitioner's Brief, Page 14).

In this case, the Circuit Court merely stated that the lower court had complied with the requirement that he must determine whether the adverse claim had more than mere color, and stated "we think there was no error"—that claimant did not tender a real controversy requiring a plenary suit.

Obviously, no principle of law was decided at all different from any principle followed in the instant case. There appears to be no such divergence, and none has been pointed out by Petitioner that has real substance.

> *In Re Gallis,* 115 F. (2d) 626—C. C. A. 7 (Petitioner's Brief, Page 15).

In this case, the Circuit Court affirmed a turnover order, saying merely there was "serious doubt upon the genuineness of appellant's creditor status"—and that it would accept the Referee's findings.

Obviously, all the Court did was merely to affirm a state of facts already found by the Referee,—but in doing so, made no decision, enunciated no principle of law that conflicts with anything to be found in the opinion of the Circuit Court in the instant case,—and consequently there is no divergence, apparent or real.

CONCLUSION

The Circuit Court of Appeals for the Second Circuit did not misinterpret and misapply the applicable decisions of this Court in the cases of *Harrison* v. *Chamberlain*, 271 U. S. 191, and *May* v. *Henderson*, 268 U. S. 111.

The Circuit Court of Appeals in its opinion herein cited the case of *Cline* v. *Kaplan* (323 U. S. 97, 99) wherein this Court confirmed the rule that when "the claim is not colorable nor frivilous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily."

The Petition Should Be Denied

Respectfully submitted,

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